



COMPENSATION MEASURES IN BULGARIA

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WATER AND NATURA 2000 NETWORK

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"COMPENSATION MEASURES IN BULGARIA"

INFORMATION REPORT

prepared

on behalf of EUROPEAN NETWORK ON THE LAW OF WATER
AND NATURE 2000

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Introduction

Overview in the area of Natura 2000

December 31, 2006 was the final date for Bulgaria to make its inventory and the list of protected areas in the European Commission. In March 2007, the Council of Ministers has submitted to the Commission documentation for Natura 2000 protected areas. At that time, in addition to the opinions of associations, 18.2 % of the country had been proposed for the Natura 2000 network. Accordingly, European Topic Centre on Biological Diversity held inadequate proposal.

Following this observation, the Council of Ministers approved in 2007, 33.8 % of the national territory as Natura 2000 areas.

Finally, in May 2011 the national network of protected areas has expanded to reach 34.34 % of Bulgaria, which makes Bulgaria the state-member with the highest percentage of Natura 2000 areas, in proportion to its national territory. Bulgaria is a country whose nature, fauna and flora are particularly varied, its conservation is a national and European issue.

Complex institutional arrangements require restructuring

It accepts the provisions of article 5 of the Law on protected territories (“LPT”) July 5, 1999, amended in 2011, OJ No. 19 of 8 March 2011, in Bulgaria there are six categories of protected areas: Reserve;

- National Park;
- Natural Monument;
- Reserve maintained;
- Park;
- Protected Area.

Forests, land and water basins are also part of the protected areas. The urbanized areas, cities and other land affected by an administrative act of regulation (local development plan, development plan) are excluded as protected areas.

In all categories of protected areas the competent administrative body for their administration and preservation is the national Biodiversity Council.

The National Biodiversity Council gives opinions and proposals to the Minister of Environment and Water issues and issues concerning biodiversity. Its missions are nine in number:

- Conduct of national policy and strategy;
- Setting priorities for development , and management of the network of protected areas, the development and management of the national Natura 2000 network , the development of management plans for protected areas and protected areas , the development of action plan for biological diversity, the sustainable use of biological resources;
- Application of normative rules;
- Integration of the conservation of biodiversity into sectorial policies;
- Appreciation lists of protected areas and amending list of protected areas;
- Evaluation of action plans for biodiversity;
- Assessment of applications for release or importation or breeding of non- regional species;
- Assessing applications for health interventions in the Reserves;
- Other issues and problems on the conservation of biological diversity.

The powers of structural body of the Council are divided according to the status of members. Regarding its operating rules are laid down in Articles 8 to 18 of the LPT. The Council shall meet at least twice a year. In case of need or emergency, the Council may be convened by the President or by a third of the members. The Council is headed by the President of the Republic, and in his absence by the President is provided by the Vice President. An agenda is prepared for all meetings, it must be sent to Board members at least five working days before the meeting. By the will of the Minister of Environment or upon proposal of the National Council of biodiversity, third parties may be invited to the deliberations. The Council takes its decisions by a simple

majority (50 +1), in case of perfect equality, it is the President who has the last word. A special feature is the requirement for members who voted against a decision of the Council to establish a formal position in writing and notify the President.

The National Biodiversity Council is an administrative structure of public law funded by the budget of the Ministry of Environment and Water. Board members receive remuneration for written opinions and reports to the Council. The amount is set by the Council itself, and depending on the complexity of the problem.

In fact, the National Biodiversity Council is a support structure and support to the Ministry of Environment and Water, which is assigned the functions of some level assessments, programs and investment projects. In this respect, it is plausible that compensation schemes and mitigation come from this administrative structure, but it appears that the Council has not yet been concerned about the issue.

Overview in the field of water

A favorable hydrological situation but deficient and even European standards infrastructure out of reach

Bulgaria is situated in a poor area of humidity but it has abundant winter precipitation that feeds enough its basins. Its renewable water resources are close to about 20 km³/year, higher assessed needs 14 km³/year. Because of the uneven distribution of rainfall in the territory and sometimes dilapidated infrastructure, some basins are frequently flooded.

The water supply networks serving almost 99 % of the population but most facilities are outdated. Approximately 20 % of water consumers are experiencing supply difficulties due to high technical losses (66 % on average) and the insufficient number of tanks. Despite the rather inefficient use, water consumption in Bulgaria (99 l / cap. / Day) is below the European average (150 l / inhab. / Day). With regard to sanitation, the equipment is problematic under: only 70 % of cities (2% of villages) have a network of collection and treatment of wastewater. 75 % of Bulgarians are connected to gathering systems but only 56% of them see their treated wastewater

treatment plant. Moreover, industrial effluents have doubled in volume in recent years with the development and progressive transition from industry to sanitation.

The World Bank estimates that more than EUR 12 billion modernization investments necessary in Bulgaria in the water sector to meet European standards.

The application of European standards is therefore out of reach: in the accession negotiations, Bulgaria obtained transitional periods for the implementation of Directive 91/271/EEC, particularly restrictive in sanitation. As a result there is obligation until 2014, to establish a network of sewage collection and processing unit in any community from 2,000 to 10,000. Bulgaria also needs to implement the Water Framework Directive of 23 October 2000 (2000/60/EC) which requires, in 2015, a high level of quality of groundwater and surface water and the development of each basin committee a management plan, the use of pricing principle by applying the polluter pays principle with the help of development plans and water management guidelines. In late 2011, the development of master plans (expected at the end of the first half of 2013) was awarded to three companies, including the French and Egis Seureca.

After years of preparation, a profound reform of the sector should be launched, probably before the end of 2013. However, it requires the adoption of a new Law on water that has delayed (proposed end of 2012, passed first reading in early 2013, since blocked due to opposition from local officials and the resignation of Borisov government). This text provides for the establishment of a decentralized management governed grouped within departmental association, transfer these associations infrastructure management, the possibility of delegated services between associations and operators (public or private), the introduction of an aggregation scheme for farmers by the regulator as well as the transfer of a small portion of the taxes in investment activity.

Moreover, to support the reform, Bulgaria called in early 2012, technical assistance from the World Bank and the EBRD for the definition of programs in the water sector.

Two areas of business opportunities: generous financing under the European funding (yet hardly used) and public-private partnerships (whose beginning is difficult).

Complex institutional arrangements require restructuring

The state is the sole owner of the national water resources. Five public entities are now competent in the area:

- The Ministry of Environment and Water, which manages the national resource and issues permits for collection and discharge of water . He is the manager of the European program "Environment" 2007 - 2013 nearly half of the funds are dedicated to projects drinking water and wastewater,
- Ministry of Regional Development and Urban Development, responsible for national sector strategy and modernization of facilities,
- 64 plant operators and water suppliers (water boards) that are owned and managed by the state and / or local governments except for the governance of the city , granted in 2000 for a period 25 years to the English company United Utilities and which will was taken back in 2010, Veolia (the dealer also has charge of the facilities for wastewater treatment)
- Local authorities, owners of sanitation, managing programs of environmental protection, construction and maintenance of water treatment facilities,
- The regulator that oversees the quality of services and supports the price of services operators (grid connection, water supply, sanitation, treatment etc.).

Other public bodies are also involved in this sector:

- Executive Agency of the environment;
- Directions of water basins;
- The Ministry of Agriculture (owner of irrigation infrastructure);
- The national electricity company (which has 24 dams and waterfalls)
- The Ministry of Economy and Energy (responsible since February 2012 the management and technical control of all dams which 2700 belong to local authorities);
- Ministry of Health (responsible for health checks).

This administrative yawrow is detrimental to the development of a coherent and sustainable public policy in the field of water.

1. - General Legal Framework

From the outset, Compensation Arrangements under Bulgarian law does not exist. Scattered provisions deal with the subject by taking a few items to say compensatory measures to mitigate and reduce the negative effects on the environment. These provisions apply primarily when a plan, program or project investment is protected in the light of national law territory.

In this respect, Article 3 of the Law on Biodiversity states that national ecological network includes:

- The protected part of the European Natura 2000 network;
- The areas protected under national law;
- Areas of special protection.

Level management plans provided for in Article 27 of the Biodiversity Act, measures must be taken to ensure the preservation of the living conditions of habitats and species protection. These measures are mainly:

- Prohibition of certain activities,
- Proactive measures against detrimental situations to the preservation of habitat conditions and species protection,
- Support measures, coordination and control,
- Measures of habitat restoration and reintroduction of species
- Conducting scientific research, training and monitoring,

This article establishes the beginnings of the future regulation of compensatory and mitigation measures.

In connection with this, under Article 31 of the aforementioned law, any type of plan, program or investment project likely to have a significant impact on the environment is subject to a compatibility study (CS). This preliminary compatibility study is a kind of pre - study on compliance plan, program or project with the purpose of preserving the ecological state of the environment.

Then the procedure is declining, depending on the case into two procedures: first, the Environmental Assessment (EA) in the case of a plan or program by an organization under public law or with public service missions and, on the other hand, the environmental impact assessment (EIA) in the case of a private investment project.

Article 31 of the Biodiversity Act determines the cases in which a preliminary compatibility study is needed. In fact all protected reserve areas, National Park, Natural Monument, maintained Reserve, Parkland, protected area, who are affected by a compatibility study. In addition, there are lists of protected areas approved by order of the Ministry of Environment and Water.

Application conditions and rules of procedure are determined by decree of 31 August 2007, last amended 30 November 2012 on the conditions and rules for achieving compatibility study plans, programs, projects and investments with the purpose and objectives for protected areas.

Article 20 of the Decree provides that in the event of imminent risk of harm to the environment as part of a plan, program or project investment, the competent authority investigates a compatibility study procedure to objectives of environmental protection. When such a decision is made, it includes information on alternative proposals, such as compensatory or mitigation requirements.

At the assessment of plans, programs and projects, the criteria set out in Article 22 of the Decree of 2007. Of the 11 criteria, we will meet the criterion number 8 on mitigation and / or measures restoration measures, and the test number 11, devoted to compensatory measures.

It is further clarified that the initiator plan, program or project investment must take charge, in accordance with Article 23 of the Decree of 2007, the development of documentation including mitigation proposals in order to avoid or reduce the impact of the initiative on the environment,

and in addition, an analysis of alternatives must be provided. Article 24 of Decree 2007 states that the bidder must produce further solutions to eliminate or reduce the negative effects of the plan ,program or project , and featuring an elaborate vocabulary for a new term appears , that of remedial measures .

2 - . Lack of clear distinction between mitigation and compensation measures

Under Bulgarian law, no statutory or regulatory provisions specifically address the issue of the distinction between mitigation and compensation measures. The requirement to provide such action is necessary to study compatibility.

The scope of mitigation and compensation measures is expanded. This applies to all investment plans, programs and projects within the scope of Article 2 of the Decree of 2007, which establishes the circumstances in which a study of accounting is required.

The legal vocabulary is not constant, and it does not allow a clear distinction between the two concepts.

However, under Article 22 of the Decree of 2007, the assessment of environmental impact, as part of the compatibility study, is done according to eleven criteria, including mitigation and / or restoration measures (criterion 8) and Countervailing Measures (criterion 11). In addition, alternative measures should be considered in accordance with criterion 9.

3. - Case Study "Bansko Ski "

The case study will be devoted to an emblematic case in Bulgaria. This is the ski resort of Bansko which the largest in the Balkans. In fact, it comes to the question of the articulation between tourism development and environmental preservation.

It will also show that in reality the plans of environmental compensation numbers do not exist.

By letter dated 13.08.2012 the Ministry of Environment and Water has decided on the investment project of the company "Ulen" AD which is the concessionaire of the ski area. The project involved the supply of water to the ski slopes in the area of Bunderitsa.

The investment project was to build a water catchment station and ancillary buildings required for this activity. The location of the project, although there has four variants, is in the Pirin National Park but also in protected BG0000209 (habitats) and BG0000209 (birds) areas. In addition, the administrative body in charge has considered that the investment project was not an area that is part of the concession and thereby the waters were high at the time of the decision exclusively owned by the state.

Therefore, the Department refused to permit for pumping based on Article 13 of the Decree of 2007 stating that the investment project is not compatible with the activities permitted in these protected areas by the plan management.

And this is how the problem revolves around the concept of the management plan. Indeed, it prohibited the construction of building, logging and sampling of resource, which makes any investment project incompatible with the objectives of preserving the area.

Therefore, in many ways, the question of possible mitigation and compensation did not arise. This is an illustration of the lack of actual environmental compensation measures.

This Decision No OVOS-1148/13.08.2012 Department resulted in an application to the State Council of 28.09.2012. The Council of State has referred the case to the Administrative Court of Sofia for the right to be done.

This case is just one example among others of the complexity of the regulatory environment of the operating field. Indeed, very often an investment project is struck by the existence of a management plan, the average length is 10 years, excluding any economic activity. Therefore, we can consider that the preservation of zoned protect as will be optimal in the extent of investment projects cannot take place.

In contrast arises the question of financing the preservation of these areas.

4. - Financial Instruments

To date, the 26.10.2013, specific plans of financial compensation to investment and / or water management or environmental projects have not been developed.

This is why the gaze is fixed on EU funding mechanisms that act as financial instruments for those who are constrained protected areas.

Under the agricultural fund for rural development, the Ministry of Economy in charge of the multiannual program provides a measure number 56 to provide compensatory payments to owners and / or users of land and forests lying in the scope of protected Natura 2000 areas. Are eligible for all areas of natural habitats within the Natura 2000 and all areas supporting bird's network.

Another measure - number 60 - is designed to offset shortfalls that a territory is seen hit by restrictions arising from the preservation requirements of Natura 2000 areas.

In addition, under the Cohesion Fund, the measure number 109 plans to support investment in the application of provisional measures and maintenance of protected areas.

5. - Case Law

The case law as regards the compensatory and mitigation regime is not abundant due to its recent introduction in the Bulgarian legal framework since the membership of Bulgaria in the EU. Nevertheless since the transposition of "Birds" and "Habitats" Directives, as well as Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment and Directive 2011/92/EC on the assessment of the effects of certain public and private projects on the environment several cases have been ruled outlining and determining the contents of these regimes. However the current case law is not directly linked with the compensation regimes but it rather includes them on the occasion of related issues such as reports on assessment of the impact on the environment.

It is in the framework of procedure of approval of investment project that the Supreme Administrative Court (the “**SAC**”) has ruled (Decision No. 16230 from 18 December 2012) on the compensation and mitigation regime. In accordance with the Environmental Protection Act it is the Supreme Environmental Expert Council (the “**SEEC**”) which issues a positive or negative opinion on the assessment of the impact on the environment. The Ministry of Environment and Water follows the conclusions of the SEEC and thus approves or rejects the report on assessment of the impact on the environment. As being administrative body the decisions issued by the SEEC have to be motivated. In this specific case the SEEC has issued a negative opinion on the report without assessing the findings of the report on assessment of the impact on the environment including the compensation measures proposed. In other words the SEEC has the obligation to consider the compensation measures as condition for the approval of the report. Hence the SAC invalidated the administrative deed as non-grounded and sent back the case to be re-examined.

In other case (Decision No. 11209 of 13 September 2012) concerning the authorization of investment project in the extraction industry of gold the SEEC has provided its positive opinion on the report of assessment on the effects on the environment which has been followed by the Ministry of Environment and the Water. This decision has been brought in action by a coalition of NGOs with scope of activity in the field of the environment. The latter have pretended that the decision approving the report has not been grounded and as a result has to be declared null and void. As regards of the compensation measures proposed and described in the report the SAC has found out that they are proportionate *vis-à-vis* the potential risks for the environment. Nevertheless in its analysis the SAC underlined that the administrative body in charge has operational independence when adopting the report and it has the discretionary power as regards to its considerations. This suggests certain legal uncertainty for investors and applicants when the administrative body assesses the compensation measures. This would not be such an issue but at present there are no official guidelines issued by the government on how the compensation measures should be applied and whether they meet the environmental criteria.

On a related basis the European Commission has recently confirmed (17 October 2013) that it will take Bulgaria to CJEU in the framework of proceedings to fulfill an obligation to protect unique habitats and important species. In the region of Kaliakra (Black Sea shore in the North-

East part of Bulgaria) which represents a major migratory route for endangered species of birds was constructed a wind power generation field, as well as other projects without adequate assessments of their environmental effects. A reasoned opinion on this matter was sent in June 2012 to Bulgaria. The Government has undertaken significant efforts to restrict the damage and prevent further developments but however failed to comply with a key requirement of the EU Habitats Directive, which obliges Member States to take appropriate measures to avoid the deterioration of habitats and disturbance of species for which the Nature 2000 sites have been designated, and compensate for any damage that occurs. The main critics of the Commission were that the Bulgarian government has permitted the constructions of the above wind turbines without approving any mitigation and/or compensation measures.

The case law of mitigation and compensation arises in disputes between the Ministry of Environment and Water, the regional inspectorates of environment and water on the one hand, and private investors on the other.

As an example here are a few things:

The first case concerns an appeal filed by "Ingenering OOD" against Decision No. 291 / 22.03.2010 of the Ministry of Environment and Water, based on Article 160 of the Water Act. Indeed, this decision approves the management plan southwest basin of water and the measures adopted by the Environmental Assessment No. 3-2/2009 which prohibits any economic activity in the basin of water between the city of Kyustendil and Greece.

In fact, he refers to the fact that the management plan, prohibiting economic activity, it is detrimental to the measures which it completely stops its investment in two hydro " MVEC Struma " project " MVEC Skrino " for which the environmental assessment took place.

The investment project falls within the protected Natura 2000 BG 0001013, 0002108 BG BGBG 0002100 and 0002107 areas. Mitigation measures under the Environmental Assessment are reducing ballasts, building fish passage and before the physicochemical water balance.

The SAC rejected the applicant's request on the grounds that the mitigation measures were not enough to make the investment project with the requirements of the management plan of southwest water basin.

The second case, No. 2270 of 12.02.2012, concerns an appeal filed by "Hidro OOD " on the rejection of the administrative authorization management of water in the region Danube basin. With decision number 00056 PV3 - 27.05.2009, the administrative authority rejects an approval of Burza river water pumping.

Indeed, by letter number 328 of 4.02.2011 , the director of the Regional Inspectorate of Environment and Water certify that the investment project falls within the scope of Natura 2000 protected areas , particularly area " Balkan Zapaden " having to BG0001040 identification number (habitats) and BG0002002 (birds).

The study of accounting with the object and purpose of nature conservation has resulted in the finding that the application of mitigation and restoration are likely to significantly reduce the negative effects so that the project investment will not produce a significant negative impact.

However, Article 46, paragraph 1 of the Water Act establishes a licensing system for water extraction. To grant such authorization, the competent authority shall take into consideration the availability of the resource needs of the applicant, the ecological status of water, and the goals of preserving the environment and the measures adopted to achieve the good ecological status determined by the management plan of water basins.

Therefore, the Director of the Directorate basin had taken a decision to refuse an investment project based on the management plan for the water basin that imposes restrictions and prohibitions with the aim of preserving habitats natural habitats and species found there. The provisions of Article 118 , j, point 4 of the Water Act provides for a ban on pumping water when the river is within the scope of Article 119a, paragraph 1 , item 5 defining the complex authorization procedures when it comes to preserving habitats or species. In this respect, the facts of the case show that the investment project involved a very Proteus area.

Moreover, in the framework of the management plan was anticipated that mitigation measures will be in effect a ban on construction of new hydraulic power.

The eyes of these elements, the valid decision of the Director of the State Council 29.07.2011 basin and dismisses the applicant's request.

This case illustrates the effect of juxtaposition of administrative procedures and some opacity of authorization schemes and exemption, and this is detrimental to legal certainty for operators.

6 - . Lack of complete legal system for alternatives measures

Due to the absence of consolidated compensation schemes there is no discussion of alternative measures , although paragraph three of the Annex to Decree 2007 provides in paragraph 7 that " alternative measures are the means of achieve the plan, program or project investment without producing a negative impact on the protected areas. Alternative measures may include: choosing another location, differentiation of geographical boundaries, change the master plan and implementation schedule or simply the use of alternative technologies. "

When the deciding authority considers that the investment project is likely to produce a significant impact on the environment, the latter decided to investigate a compatibility study in which alternative measures should be considered.

Then the assessment of the effect of a plan, program or project is assessed according to the criteria set out in Article 22 of the Decree of 2007, including the presence or absence of alternatives (item 9).

It is plausible that an alternative measure could go to open an investment project, but in reality the absence of specific plans as well as clear definitions do not allow for the efficient functioning of alternatives.

7. – Conclusion

In conclusion, it is imperative to standardize mitigation and compensation measures, and alternatives as legal uncertainty and sovereign appreciation of the managing authorities is detrimental to the Bulgarian economy.

The majority of protected areas are governed by rigid plans and non-scalable management, and therefore no investment project can not intervene.

Moreover, the absence of clear and precise legal definitions of what constitutes a compensation mitigation measure or allow private operators in the permanent doubt validation of their proposal.

Least, financial compensation for damage to the environment do not exist, for example in the ski resort of Bansko could very well produced a double effect: that of restoring an ecological status for a degraded zone and the consolidation of tourism.

Finally, the absence of the Environmental Code in Bulgaria is detrimental to the building-up and the predictability of the whole legal systems in the field of environment.